

1 Laura A. Wasser, Esq. (SBN 173740)
2 WASSER, COOPERMAN & CARTER, P.C.
3 2029 Century Park East, Suite 1200
4 Los Angeles, California 90067-2957
5 Telephone No.: (310)277-7117
6 Facsimile No.: (310)553-1793

LOS ANGELES
SUPERIOR COURT

SEP 04 2007

ORIGINAL FILED

Attorneys for Petitioner

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

Redacted

11 In re the Marriage of

CASE NO. BD 455662

[Assigned to Dept. 88,
Commr. Scott Gordon]

13 Petitioner: BRITNEY SPEARS

15 and

17 Respondent: KEVIN FEDERLINE

PETITIONER'S EVIDENTIARY
OBJECTIONS AND REQUEST TO
STRIKE PORTIONS OF THE
DECLARATIONS OF (1) KEVIN
FEDERLINE DATED 8/7/07; (2)
ALISHA DEATHERAGE DATED
1/3/07; (3) JENNIFER MCCARTHY
DATED 8/2/07; (4) JAMES M. SIMON
DATED 8/8/07; AND (5) MARK
VINCENT KAPLAN DATED 8/7/07;
DECLARATION OF LAURA A.
WASSER, ESQ., DATED AUGUST
30, 2007; MEMORANDUM OF
POINTS AND AUTHORITIES

STATUS CONFERENCE RE OSC

DATE: September 4, 2007
TIME: 8:30 A.M.
DEPT: 88

OSC

DATE: September 17, 2007
TIME: 8:30 A.M.
DEPT: 88

1 DECLARATION OF LAURA A. WASSER, ESQ.

2 I, LAURA A. WASSER, hereby declare:

3 I am one of the attorneys responsible for the representation of Petitioner, BRITNEY
4 SPEARS, in the within cause of action. I have personal knowledge of the facts set forth in
5 this Declaration, and if called and sworn as a witness, I could and would testify
6 competently thereto. I submit this Declaration in support of Petitioner's Evidentiary
7 Objections and Request to Strike Portions of the Declarations of Kevin Federline, Alisha
8 Deatherage, Jennifer McCarthy, James M. Simon and Mark Vincent Kaplan (collectively
9 hereinafter referred to as the "Subject Declarations") filed in connection with Respondent's
10 Order to Show Cause for Modification of Child Custody, Child Visitation, Injunctive
11 Orders and Attorneys' Fees and Costs. This matter is currently set for hearing on
12 September 4, 2007, at 8:30 a.m., in Department 88 of the above-entitled court and on
13 September 17, 2007, at 8:30 a.m., in Department 88 of the above-entitled court.

14 PETITIONER'S REQUESTED RELIEF

15 I submit this Declaration in support of Petitioner's request that the Court strike
16 various portions of the Subject Declarations. Attached hereto as Exhibit "A" are the
17 Subject Declarations, with the objectionable portions stricken for easy reference by this
18 Court. Each portion of said Declarations are objectionable based upon the grounds set forth
19 in Exhibit "1." Attached hereto as Exhibit "2" are clean copies of the Subject
20 Declarations.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct.

23 Executed this 30th day of August, 2007, at Los Angeles, California.

24
25 
26 _____
27 LAURA A. WASSER
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 Respondent's Order to Show Cause for Modification of Child Custody, Child
3 Visitation, Injunctive Orders and Attorneys' Fees and Costs, filed on August 8, 2007
4 and set for a Status Conference on August 4, 2007 and hearing on September 17,
5 2007, contains substantial objectionable material and insufficient admissible evidence
6 to sustain Respondent's asserted position. As is more particularly set forth in the
7 Declaration of Laura A. Wasser, Esq., the Subject Declarations contain statements
8 which are (1) lacking in proper foundation, (2) assuming facts not in evidence, (3)
9 conclusion, (4) hearsay/based on hearsay, (5) pure speculation/conjecture, (6) not
10 based on personal knowledge, (7) misstate the evidence, (8) not relevant, and/or (9)
11 more prejudicial than probative (Evidence Code §352).

12
13 I.

14 THE COURT HAS THE POWER
15 TO STRIKE IMPROPER MATERIAL

16 The Court may, at any time, strike out any irrelevant or improper matters
17 inserted in any pleadings. California Code of Civil Procedure §436(a). Further, a
18 party must object to and move to strike proffered evidence that is objectionable or
19 improper, if the party seeks to preserve its post-trial rights with respect thereto.
20 California Evidence Code §353(a).

21 "[T]he affidavit must state facts - facts that are specific facts, probative facts,
22 and evidentiary facts - and the facts stated must be competent evidence and must
23 stand the same test as oral evidence. Conclusions, hearsay, and statements on
24 information and belief are not to be considered." Then Commissioner, now Judge
25 Robert Schnider, Los Angeles County Bar Association "Family Law Symposium"
26 (1988 Edition), page 222.

27 Admissibility of a statement set forth in a declaration is measured by the same
28 standards as those applied to oral testimony. Except as provided in Evidence Code

1 §801, the testimony of a witness, lay or expert, concerning a matter is inadmissible
2 unless he has personal knowledge of those facts. Evidence Code §702(a); See
3 McLellan v. McLellan (1972) 23 Cal. App.3d 343, 359-60. If personal knowledge is
4 not established and the objection of lack of personal knowledge is raised, personal
5 knowledge of the witness must be established before the witness may testify
6 concerning the matter. Tri-State Mfg. Co. v. Superior Court (1964) 224 Cal.App.2d
7 442. The burden of proving personal knowledge rests on the party seeking to
8 introduce the testimony. Evidence Code §403(a). Testimony of a witness is
9 inadmissible if it is not based on the witness' personal knowledge. Evidence Code
10 §1200(b); Weathers v. Kaiser Foundation Hospital (1971) 5 Cal.3d 98.

11 The Court may not rely on statements contained in a memorandum of points
12 and authorities to evaluate the merits of a case. Such information lacks foundation
13 and may not be considered as admissible evidentiary facts. "Matters set forth
14 in...memoranda of points and authorities are not evidence..." Smith, Smith & Kring
15 v. Superior Court (1997) 60 Cal.App.4th 573.

16 Opinion testimony in a declaration, unless from an expert or based on a lay
17 witness' own perception, is inadmissible. Evidence Code §800; Tri-State Mfg. Co.,
18 supra. In Tri-State Mfg. Co., supra, the challenged declaration was that of an
19 attorney whose understanding of the subject case was surmised only from a review of
20 the office file; the attorney did not have independent personal knowledge of any of
21 the assertions made. As a result, the Court of Appeal held that the declaration,
22 "consisting of mere conclusions and hearsay, was a nullity and of no evidentiary
23 value." Id.

24 It is well established that a declaration which sets forth conclusions, opinions
25 or ultimate facts without a sufficient factual foundation is legally insufficient, and
26 such unsupported statements should be stricken upon request. The test of the
27 sufficiency of the declaration is whether it has been written in such a manner that
28 perjury could be charged thereon if any material allegation contained therein is false.

1 A declaration containing conclusions, opinions or ultimate facts, without a
2 foundation of admissible evidentiary facts and circumstances from which such
3 conclusions, opinions or ultimate facts can be deduced by the Court, does not
4 measure up to this requirement. Atiya v. Dibartolo (1976) 63 Cal. App.3d 121,133;
5 People v. Thompson (1935) 5 Cal.App.2d 655, 664; Fuller v. Goodyear Tire and
6 Rubber (1970) 7 Cal.App.3d 690, 693; Greshko v. County of Los Angeles (1987) 194
7 Cal.App.3d 822, 834.

8 Inclusion of argument in a declaration is a practice that forces the trial and
9 appellate court, and opposing counsel, to determine which facts are supported under
10 oath and which material is supported by statements made under penalty of perjury.
11 In Re Marriage of Heggie (2002) 99 Cal. App.4th 28. The Court of Appeal in Heggie
12 stated, in footnote 3, that declarations should be supported by statements made under
13 penalty of perjury and further, that the proper place for argument is in points and
14 authorities, not declarations.

15 Unless a recognized exception applies, hearsay is inadmissible. See Evidence
16 Code §§1200 et seq.; See also Bank of America Nat. Trust and Savings Ass'n v.
17 Williams (1948) 89 Cal. App.2d 21, 200 P.2d 151, 157 (holding that statements in
18 declaration made on information and belief as to facts that have transpired are
19 hearsay and must be disregarded); Michael E. Leippman, M.D., Inc. v. Leiber (1986)
20 180 Cal. App.3d 914, 919 (concluding that hearsay, generalities, and conclusions in
21 declarations are inadmissible).

22 Even a qualified expert's opinion is inadmissible if it is unsubstantiated by the
23 facts. Atiya, supra (1976) 63 Cal.App.3d 121, 126; Greshko, supra (1987) 194 Cal.
24 App.3d 822, 834. Although an expert may properly rely on hearsay in forming an
25 opinion, the expert may not relate the out-of-court statements of another as
26 independent proof of the fact. An expert witness may not testify as to the details of
27 matters relied upon which are otherwise inadmissible and may not under the guise of
28 giving reasons introduce otherwise incompetent hearsay evidence. Korsak v. Atlas

1 Hotels (1992) 2 Cal.App.4th 1516, 1525. An expert may not base his or her opinion
2 upon the outside opinion of another expert. Mosesian v. Pennwalt Corp (1987) 191
3 Cal.App.3d 851, 860.

4 Questions of law are strictly within the province of the Court to decide and are
5 not subject to resolution by the testimony of experts. Williams v. Coombs (1986)
6 179 Cal.App.3d 626, 638. Our system of jurisprudence does not permit a "trial by
7 oath," whereby a party seeks to weigh the scales of justice in his or her favor through
8 the admission of experts who would opine in his or her favor. Downer v. Bramet
9 (1984) 152 Cal.App.3d 837, 842. Accordingly, an expert cannot opine as to
10 questions of law, nor can an expert testify as to legal conclusions in the guise of
11 expert testimony under §805 of the Evidence Code. Devin v. United Services
12 Automobile Assn (1992) 6 Cal.App.4th 1149, 1158; Downer, supra.

13 Further, Evidence Code §352 provides that any unduly prejudicial or
14 misleading material may be excluded or stricken if its probative value is substantially
15 outweighed by the probability that its admission into evidence is unnecessarily time
16 consuming (e.g., repetitive), prejudicial or that it confuses the issue.

17 18 II.

19 CONCLUSION

20 Although the Rules of Evidence are well-known, they are frequently ignored
21 in the context of declarations. Upon the making of objections, the Court must rule on
22 the contents of the Subject Declarations in accordance with the Rules of Evidence.
23 As specifically set forth in the Declaration of Laura A. Wasser, Esq., the Subject
24 Declarations are filled with objectionable and inadmissible statements and their
25 deficiencies must be considered.

26 Applying the above-cited rules to the Subject Declarations has the effect of
27 totally eviscerating portions of said Declarations. Based upon the Declaration of
28 Laura A. Wasser, Esq., containing the specific objections and the oral argument to be

By: LAURA A. WASSER
Attorneys for Petitioner

**Sealed and Removed
Entire Document**